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Nos. 80-1798 and 80-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1798

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF AIR CONDITIONING & REFRIGERATION INSTITUTE, AIR MOVEMENT AND CONTROL ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, INC.

IN SUPPORT OF

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Air Conditioning & Refrigeration Institute, the Air Movement and Control Association, Inc., the American Consulting Engineers Council, the Architectural Woodwork Institute, the National Society of Professional Engineers, and the National Woodwork Manufacturers Association, Inc., move this Court for leave to file the accompanying brief as amicus curiae supporting the petitioners, Woelke & Romero Framing, Inc., and the Pacific Northwest Chapter of the Associated Builders & Contractors. In support of this motion, the above-named amici show as follows:

1. The associations joining herein have a substantial and longstanding interest in the effective implementation of the statutory prohibitions against secondary boycotts, particularly in the construction industry. Members of the American Consulting Engineers Council (ACEC) and the National Society of Professional Engineers (NSPE) design, specify and provide engineering services on all types of construction projects and therefore have a major role in determining the material, components and methods to be used in construction. Members of the Air Movement and Control Association (AMCA), the Air Conditioning & Refrigeration Institute (ARI), the Architectural Woodwork Institute (AWI), and the National Woodwork Manufacturers Association (NWMA), manufacture materials and components used in construction throughout the United States. Together, these associations represent a substantial segment of the construction industry.

2. The amici joining herein have wide experience with the problems in the construction industry resulting from secondary boycotts effectuated through diverse union conduct. As construction industry designers, engineers and manufacturers, the amici are affected directly and substantially by labor and work rule restrictions that reduce the latitude of construction contractors to select the most appropriate methods, materials and components. Accordingly, they have participated individually, jointly and with other industry associations in many cases before the National Labor Relations Board ("NLRB" or "the Board") and the courts in which the interpretation and application of the secondary boycott provisions of the National Labor Relations Act were in issue.*

3. The issues presented for the Court's consideration by the petitions for a writ of certiorari in these cases are of crucial importance to the amici. Of particular concern is the use of union subcontracting agreements to effectuate product boycotts unrelated to the legitimate interests of unions in setting wage rates and working conditions. The amici believe that under the Ninth Circuit's ruling, project owners, architects and engineers will often be left without the option of utilizing prefabricated or factory-assembled components which unions refuse to install, since the general contractors may be barred from dealing with all non-union subcontractors who are free to install such components.

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* *NLRB v. Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507 (1977); *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

4. The written consents of the Solicitor General and counsel for the petitioners to the filing of this brief have been filed with the Clerk of the Court. Counsel for the Unions in No. 80-1808 has indicated that his client is unwilling to grant consent and his letter also has been filed with the Clerk of the Court. Counsel for the Union in No. 80-1798 has not responded to the request for consent.

WHEREFORE, it is respectfully moved that the amici joining herein be granted leave to file the accompanying brief amicus curiae in these cases.

Respectfully submitted,

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This brief amicus curiae on behalf of the above-named organizations is submitted contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The interest of the amici joining herein in the issues presented for the Court's review in these cases is detailed in the accompanying motion. (*Supra*, pp. 1-4).

STATEMENT OF THE CASE

The petitions for certiorari concern two separate cases of secondary conduct which were consolidated at both the Board [1] and appellate levels. Case No. 80-1798 concerns a proposed collective bargaining agreement which two Carpenter's Union locals sought to negotiate with the employer after the then-current agreement lapsed. One of the clauses would have forbidden the company to subcontract jobsite work except to firms having a current agreement with the Carpenters. Following an impasse in bargaining, the unions picketed the employer, and workers employed by other subcontractors stopped work on some of the projects. The NLRB held that the construction industry proviso to Section 8(e) of the Labor Act protected the proposed clause and that the picketing designed to secure acceptance of the clause was lawful.

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[1] These two cases, along with several other cases, were initially consolidated for oral argument by the NLRB in 1978. Among the cases was *Donald Schriver, et al. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3822 (U.S. May 5, 1981).

Case No. 80-1808 emanates from a collective bargaining agreement negotiated by an Engineers Union local and a chapter of the Associated General Contractors (AGC). The agreement precluded AGC employers from assigning work to any subcontractor not having a current agreement with the union. A chapter of the Associated Builders and Contractors (A.B. & C.) charged that the subcontracting restriction violated Section 8(e) of the Labor Act. The NLRB upheld the legality of the clause but struck down a self-enforcement provision which allowed the union to strike or picket to enforce the subcontractor clause.

A three-judge panel of the Ninth Circuit subsequently reversed the Board in material part and sustained the employers' petitions for review. 609 F.2d 1341 (9th Cir. 1979). Thereafter, the Court of Appeals granted petitions for rehearing *en banc* and ordered the matters reheard before a limited *en banc* panel as provided by statute and local rule. On April 17, 1981, the Ninth Circuit issued its opinion and judgment affirming the decisions and orders of the Board.

REASONS FOR GRANTING THE WRIT

THESE PETITIONS PRESENT THE LAST CHANCE FOR THIS OR ANY COURT TO RESOLVE IMPORTANT QUESTIONS CONCERNING THE SCOPE OF SECTION 8(e) WHICH THIS COURT LEFT UNANSWERED IN THE *CONNELL* CASE

The petitions for certiorari in these cases present the last remaining opportunity for judicial review of a difficult set of legal questions concerning the applicability of Section 8(e) of the National Labor

Relations Act to restrictive subcontracting agreements in the construction industry. The importance of these questions, not only to employers and unions within the industry, but also to their customers and suppliers and ultimately to the economy of our nation, can scarcely be overstated.

When the Labor Board first confronted these issues, it scheduled an unprecedented six hours of oral argument in recognition of both their complexity and their great importance.[2] Since the Board announced its decisions in these cases, rejecting in large part the position of its own General Counsel,[3] only two courts have had occasion to review the Board's resolution of the issues involved. A three-judge panel of the District of Columbia Circuit upheld the Board's position in *Donald Shriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980). In the cases at bar, as noted above, a three-judge panel of the Ninth Circuit initially rejected the Board's position. Later, upon rehearing, a seven-judge majority of a limited *en banc* panel of the Ninth Circuit reversed the earlier panel decision and upheld the Board's decisions over vigorous dissents by the remaining four

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[2] The court of appeals below also expressly acknowledged the importance of these issues in the first sentence of its opinion. A.B. & C. Pet. A-3.

[3] The NLRB General Counsel's carefully considered opinion on these legal issues is set forth at length in Memorandum 76-57, issued from his office on December 15, 1976, and published at 93 LLR 390. At the outset of that memorandum, the General Counsel notes that the issues discussed "are exceedingly difficult and the answers to them are likely to have a substantial impact on construction industry employers and unions." 93 LLR at 391.

judges who participated. Even the judges of the majority acknowledged that their view of the scope of Section 8(e) is "not free from doubt." A.B. & C. Pet. A-28.

Unless this Court grants review in these cases, that doubt can never be resolved. No other court will ever have an opportunity to address the issues presented here, because the position taken by the Labor Board in these cases precludes its General Counsel from issuing any more complaints alleging that subcontracting restrictions of the kind involved herein violate Section 8(e) of the Act.[4] And, because the General Counsel's authority to issue complaints is exclusive and essentially unreviewable under the Act, no such case can reach even the Board, let alone any court, without issuance of a complaint by the General Counsel. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975).

Consequently, the decision appealed from in these cases has significance extending beyond the boundaries of any judicial circuit. If this Court denies review, building trade unions throughout the country will henceforth be free to force any construction contractor with whom they have any sort of collective bargaining relationship to agree never to engage any non-union subcontractor—or, indeed, any subcontractor who is not signatory to an agreement with a *particular* union—to work on any construction site, regardless of whether the contractor has employees of his own working there. Thus, denial of these peti-

[4] Indeed, the General Counsel stopped issuing such complaints immediately after the Board's decisions herein issued in November 1978.

tions would render purely academic the much-debated question whether this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975), requires more than the bare existence of some collective bargaining relationship between the union and the signatory contractor in order to legitimize such broad secondary boycott agreements under the construction industry proviso to Section 8(e). Indeed, this Court would be effectively foreclosed from ever addressing the important questions regarding the scope of Section 8(e) which it did not fully resolve in *Connell*.

The associations joining in this *amicus curiae* brief strongly believe that the questions presented by these petitions are too important, and the reasoning in support of the decisions below too tenuous, to be allowed to escape forever from further judicial review. The court of appeals' holding that Section 8(e) permits unions in the construction industry to force any contractor with whom they have any sort of bargaining relationship to agree to boycott all subcontractors whose employees have chosen the "wrong" union or no union, if allowed to stand, will seriously endanger not only employee freedom of choice in the construction industry, but also the survival of competition based upon efficiency of operation and technology. Moreover, it will do so in a way that cannot be justified on the basis of legitimate union concerns.

Restrictive subcontracting agreements of the sort involved in these cases are, by their very nature, secondary and anticompetitive devices. Their whole purpose is to exclude non-union subcontractors from a portion of the competitive construction market. But

their ultimate effect on efficiency and productivity in the industry involves much more than just the elimination of *subcontractors* from the competition. For in the process, they also effectively eliminate many efficient *methods* and innovative *products* from use in construction. By strengthening the impact of the restrictive work rules and jurisdictional limitations that characterize unionized construction, such agreements aggravate the inflationary environment that particularly plagues this industry, to the detriment of the national economy.

The members of the associations joining in this brief know from long experience that the anticompetitive impact of broad subcontracting restrictions, like the ones involved in these cases, inevitably extends far beyond competition based on wages and working conditions. For a construction contractor who agrees to deal only with unionized subcontractors thereby subscribes not only to union-approved wage rates and working conditions, but also, almost invariably, to an elaborate set of restrictions upon the methods, materials and components that may be used on any project where it is engaged. When applied during the course of a construction project, these restrictions impose severe limitations on the ability of the project owners, designers and general contractors to utilize the methods they deem most desirable for the particular job.

This Court observed in *Connell Construction Company, Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616, 624 (1975), that the union-employer agreements in issue in that case "indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were

not derived from substandard wages and working conditions but rather from more efficient operating methods." The same is unquestionably true of the agreements at issue in the present cases. They differentiate between subcontractors solely on the basis of whether they have signed contracts with the "proper" union, not on the basis of the wages and employment terms the subcontractors provide to their employees.

Connell teaches that a proper accommodation of federal labor and antitrust policies requires that the construction industry proviso be given limited scope. It protects jobsite subcontracting restrictions only to the extent that they relate to legitimate union interests growing out of circumstances unique to the construction industry. This Court did not undertake to define in *Connell* precisely what union interests qualify for this protection, but the focus of the Court's discussion was upon the concerns expressed in Congressional debates preceding Section 8(e)'s enactment about "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." 421 U.S. at 631, quoting from *Drivers Local 695 v. NLRB*, 361 F.2d 547, 557 (D.C. Cir. 1966). Thus, it is clear that subcontracting restrictions which go no farther than is necessary to prevent such possible jobsite friction—*i.e.*, collectively bargained agreements which do no more than bar the signatory contractor from engaging non-union firms to work on jobsites where his unionized employees are currently working—are protected by the proviso even though they entail some restraint on competition and efficiency. The question not fully resolved by *Connell*, but squarely presented

by the instant petitions, is whether subcontracting restrictions which are not so limited in application may also be within the proviso's scope.

The NLRB General Counsel's office, after carefully analyzing various types of subcontracting restrictions in light of the *Connell* decision, answered this question in the negative. The General Counsel concluded that clauses extending to jobsites where the signatory contractor does not use any employees of his own, or to phases of construction when the signatory's employees would not be present, are "broader than required by the union's legitimate interests" and, therefore, "are not within the scope of the proviso." Office of the General Counsel Memorandum 76-57, 93 LLR 390, 393 (1976).[5]

The four dissenting judges in the court below substantially agreed with this analysis. They pointed out that the problem of preventing jobsite friction, which they viewed as "the dominant motive of Congress in adopting the proviso," is dealt with effectively by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. A.B. & C. Pet. A-101 (Sneed, J., dissenting). While they acknowledged that even such limited agreements would have some "top-down" organizing effects, they emphasized that such agreements at least would not require the signatory employer to "sacrific[e] *all* right to choose the most efficient subcontractor." *Id.* at A-100 (emphasis added).

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[5] The General Counsel's office was, of course, required to abandon this interpretation of the proviso when the Board issued its contrary holding in these cases.

The majority in the court below acknowledged that the legislative history supporting their broader interpretation of the construction industry proviso is not particularly compelling. A.B. & C. Pet. A-28. They also conceded that "the language in the *Connell* opinion dealing with congressional antagonism to 'top-down organizing' may well lean in a direction contrary to our views" *id.* at A-54, and that the *Connell* Court's summary of the proviso's effect "might be susceptible to another reading." *Id.* at A-58. Further, the majority observed that even the position of the Labor Board on these issues "has not been an unwavering one." *Id.* at A-62.

Given the enormous practical and economic consequences of the legal questions at stake here, their answers should not be left to rest forever on such infirm foundations. Given the repeated expressions of doubt by the majority below about the correctness of their reading of *Connell* and the legislative history of the construction industry proviso, their decision should not be left to stand as the last judicial word on the subject. Given the weight of support for the alternative interpretation of the proviso advocated in the General Counsel's 1976 memorandum and adopted by the dissenters below, which would accommodate not only the interest of building trade unions in preserving jobsite peace, but also the important public interest favoring competition based on efficiency in construction, the question of which interpretation is correct deserves further judicial review. And since these petitions present the last opportunity for any court to provide such review, they should be granted.

CONCLUSION

For the reasons set forth above, and those stated in the petitions heretofore filed by Woelke and Romero Framing, Inc., and Pacific Northwest Chapter of the Associated Builders and Contractors, Inc., the *amici curiae* respectfully urge the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

Respectfully submitted,

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